No. 96-1783

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,

Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONSE OF HILLARY RODHAM CLINTON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Office of the President does not possess an attorney-client privilege that may be asserted in response to a federal grand jury subpoena and must comply with the subpoena.

2. Whether work performed by attorneys for an entity of the federal government in anticipation of grand jury proceedings involving the entity and employees of the entity, or in preparation for legislative hearings investigating the operations of the entity, is protected under the attorney work product doctrine.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption,
Hillary Rodham Clinton was a party in the court of appeals.

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Respondent Hillary Rodham Clinton respectfully submits this response in support of the petition for a writ of certiorari filed by the Office of the President to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The memorandum opinion and order of the district court (Pet. App. 62a-83a)[1] is unreported. The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 9, 1997. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Rule 501 of the Federal Rules of Evidence is set forth at Pet. App. 96a.

STATEMENT

Respondent[2] adopts and incorporates herein by reference the statement of facts set forth in the petition for a writ of certiorari filed by the Office of the President.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the Office of the President.

[2] In the court below, Mrs. Clinton filed a motion to intervene prior to briefing and argument, and that motion was granted. She proceeds here as a respondent, pursuant to this Court's Rule 12.6, and files this response in support of the Office of the President's petition for a writ of certiorari. *See Metropolitan Washington Airports Auth. v. Citizens for Abatement*, 501 U.S. 252, 264 n.12 (1991); *Director v. Perini N. River Assocs.*, 459 U.S. 297, 304 (1983); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783-84 (1980).

ARGUMENT

The decision of the court below does not directly invade respondent Clinton's ability to consult confidentially with her personal counsel. The Independent Counsel ("IC") did not seek notes taken by her own attorneys, nor seek to intrude upon the sanctity of a meeting solely between her and her private lawyers. Accordingly, respondent is not filing a petition for a writ of certiorari on her own behalf.

The decision below nevertheless has important implications for any person in public life who, like Mrs. Clinton, may have an "official" capacity as a constituent part of a government entity that is represented by government counsel. The Eighth Circuit majority opinion makes impossible the confidential, effective, and efficient consultation of such a person's personal lawyers with government lawyers who represent the agency with which the person is affiliated. The ability to consult candidly and privately is vital if both sets of counsel are to do their jobs properly. Respondent is therefore filing this response in support of the position of the Office of the President and respectfully submits that the petition for writ of certiorari filed by that Office should be granted, for the reasons set forth in the petition and adopted here by reference. A few additional observations are appropriate.

1. There is no issue presented of the Independent Counsel's ability to obtain information from Mrs. Clinton. Indeed, she has made herself freely available to the IC, testifying orally under oath three times at the White House

and once before the IC's grand jury in Washington, D.C.[3] Moreover, the IC has been free to question Mrs. Clinton about the underlying facts that she may have discussed with her personal or White House counsel.

2. The ruling of the court below is quite literally unprecedented. As the petition of the Office of the President makes clear, there are many cases recognizing a federal governmental attorney-client privilege in the civil context, Congress has explicitly provided for it in (for example) the Freedom of Information Act, state bar ethics rules apply to the relationship of government lawyers and their clients,[4] and the great weight of scholarly authority acknowledges the privilege. Moreover, the Eighth Circuit majority's invention of a context-specific exception to the federal attorney-client privilege constitutes a radical departure from decisions of this Court over a period of 170 years recognizing that this privilege is--and must be--absolute. *See*, *e.g.*, *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826)[5]; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1877); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915). As this Court observed in *Upjohn Co. v. United*

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[3] She also has provided sworn answers to interrogatories submitted by the IC, and she and the President have produced over 90,000 pages of documents to the IC.

[4] All of the attorneys present at the two meetings with Mrs. Clinton at issue in this case were members of the District of Columbia Bar. District of Columbia Rule of Professional Conduct 1.6(i) ("Confidentiality of Information") provides that "[t]he client of the government lawyer is the agency that employs the lawyer."

[5] "The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time." *Id.*

States, 449 U.S. 383, 393 (1981): "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *See also Jaffee v. Redmond*, ___ U.S. ___, 116 S. Ct. 1923, 1932 (1996) ("Making the promise of [a therapist's] confidentiality contingent . . . would eviscerate the effectiveness of the privilege.").

3. The decision below disregards the compelling need for personal and governmental lawyers to consult in a situation where a person with official responsibilities is under partisan attack and faces investigation by Congress, administrative agencies, and one or more independent counsel. Courts have construed broadly the kinds of "common interest" that allow separate lawyers to consult confidentially without destroying the attorney-client privilege.[6] Most often, a common interest is recognized where two or more clients face the same adversary or are

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[6] The rule enables counsel for clients with a common interest to exchange privileged communications and attorney work product in order to provide more effective representation:

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990).

involved in the same investigation.[7] The interests of the two clients need not be identical, and they may even be adverse in some respects or at some future date, but the privilege is recognized so long as the clients share some common interest at the time of the communication.[8] In this case, of course, there is simply one person with both a private status and an official status as part of a government entity represented by government counsel.

The district court found that the consultations here "took place in the midst of several investigations and legal proceedings of an adversarial nature." Pet. App. 75a (footnote omitted). Personal and official lawyers, each enjoying a privileged relationship with their client (respectively, Mrs. Clinton and the Office of the President), attended these two meetings, and the district court concluded that "it cannot be said that Mrs. Clinton was unreasonable in seeking the advice of counsel in both her personal and official capacity."[9] *Ibid.*

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[7] *See, e.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964); *Chan v. City of Chicago*, 162 F.R.D. 344, 345-46 (N.D. Ill. 1995); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 389-92 (S.D.N.Y. 1975). The common interest rule applies when one set of lawyers represents a government agency and the other group represents a private party. *See, e.g., United States v. AT&T*, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (document sharing between Department of Justice lawyers and MCI lawyers held protected).

[8] The shared interest which the privilege protects may be "legal, factual, or strategic in character." *Restatement (Third) of the Law Governing Lawyers § 126 cmt. e (Proposed Final Draft No. 1, 1996).*

[9] The district court also pointedly observed:

The common interest privilege is particularly important in the case of a person with official responsibilities because there is a need for confidential and frank communication between government and personal counsel[10] to determine the bounds of the individual's official responsibilities and thus which lawyers should be undertaking which tasks.

4. The result of the opinion below will be to force prudent personal counsel to advise their governmental clients not to speak with governmental attorneys. It is simply impossible to predict what individual or statements may one day become relevant to an independent counsel's inquiry, or what possible use an independent counsel might seek to make of statements previously made. Such advice not to speak to government counsel, needless to say, would create an excruciating dilemma for government employees who may have an obligation to provide information to their employer.

> Indeed, the Independent Counsel implicitly acknowledged the dual nature of Mrs. Clinton's legal identity when both personal and White House lawyers were present at each of her three interviews conducted at the White House by the Independent Counsel. The Independent Counsel did not object to the presence of White House lawyers at these interviews and, in fact, negotiated the terms of the interviews with both sets of counsel.

Pet. App. 75a. The IC's sudden determination that there was no attorney-client privilege available to the Office of the President was made late in the day, for reasons that remain inscrutable.

[10] The district court recognized the need for a privilege umbrella to protect discussions about which lawyers should most appropriately undertake what tasks: "[I]t is not always clear whether personal counsel or White House Counsel's Office attorneys representing the Office of the President should undertake various legal assignments." Pet. App. 74a.

If the advice is followed, the consequence will be to deny useful information to government counsel and impair the ability of government counsel to render fully informed legal advice to the client. As this Court recognized in *Upjohn*, the attorney-client privilege exists not only to protect the giving of professional advice to a client but also to protect "the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390.[11]

5. Attorneys for the Office of the President and Mrs. Clinton reasonably believed their communications were privileged, and for that reason they should be protected from disclosure. The district court held that there was a reasonable expectation of confidentiality "based as it was on communications with licensed attorneys and in the midst of adverse legal proceedings."[12] Pet. App. 76a.

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[11] In *Trammel v. United States*, 445 U.S. 40, 51 (1980), the Court recognized that "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

[12] The court below mischaracterized both the district court's holding and Mrs. Clinton's position with respect to the reasonable expectations of the persons at the two meetings. The court of appeals stated that "[b]ecause Mrs. Clinton does not claim that she believed that the White House lawyers represented her personally, her argument must be that she believed that the law sweeps broadly enough to cloak these conversations within the attorney-client privilege." Pet. App. 24a (footnote omitted). The point is that Mrs. Clinton quite reasonably believed that the White House counsel were present to obtain information and give advice to the Office of the President of which she and they reasonably and correctly understood her to be a part. The point is not (as the court below asserted) that subjective belief can "transform an otherwise unprivileged conversation into a privileged one." *Ibid.* It is well established, as the district court found (Pet. App. 76a), that when there is a *reasonable* belief on the part of a putative client that the conversation he or she is

6. The attorney notes at issue here would not have been created but for the expectation of all those attending the meetings that the communications would remain privileged. The IC is therefore in no different a position with the privilege than he would be without it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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having is a privileged one, the conversation will be protected because, under such circumstances, "the client should not be compelled to bear the risk" that the conversation is not privileged, *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981). The reasonableness evaluation "is determined from the perspective of the client," *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. Cal. 1995), and an attorney-client relationship may be recognized even between a private citizen and a government lawyer, *United States v. Schaltenbrand*, 930 F.2d 1554, 1562-63 (11th Cir. 1991).